BEFORE THE

Federal Communications Commission

WASHINGTON, D.C.

In the Matter of	)	
	)	
Implementation of the Cable	)	
Television Consumer Protection	)	CS Docket No. 97-248
and Competition Act of 1992	)	
	)	
Petition for Rulemaking of	)	
Ameritech New Media, Inc.	)	RM No. 9097
Regarding Development of	)	
Competition and Diversity in	)	
Video Programming Distribution	)	
and Carriage	)	

COMMENTS OF LIBERTY MEDIA CORPORATION

WILLKIE FARR & GALLAGHER
Three Lafayette Centre
1155 21st Street, N.W.
Suite 600
Washington, D.C. 20036
(202) 328-8000

Its Attorneys

February 2, 1998

TABLE OF CONTENTS

BEFORE THE

Federal Communications Commission

WASHINGTON, D.C.

In the Matter of:	)	
	)	
Implementation of the Cable Television Consumer Protection and Competition Act of 1992	)	CS Docket No. 97-248
	)	
	)	
Petition for Rulemaking of Ameritech New Media, Inc. Regarding Development of Competition and Diversity in Video Programming Distribution and Carriage	)	RM No. 9097

COMMENTS OF LIBERTY MEDIA CORPORATION

Liberty Media Corporation ("Liberty Media") hereby files its comments in response to the Commission's Notice of Proposed Rulemaking in the above-captioned proceeding.[1]

I. INTRODUCTION AND SUMMARY

Ameritech and a few other parties ("Petitioners") have asked the Commission to adopt significant changes to the program access rules based on allegations rather than facts. Liberty Media urges

---

[1] Implementation of the Cable Television Consumer Protection and Competition Act of 1992, Petition for Rulemaking of Ameritech New Media, Inc. Regarding Development of Competition and Diversity in Video Programming Distribution and Carriage, Memorandum Opinion and Order and Notice of Proposed Rulemaking, CS Docket No. 97-248, FCC 97-415 (rel. Dec. 18, 1997) ("Notice").

the Commission to reject this approach. In the five years since their adoption, the program access rules have produced a body of evidence that is directly contrary to Petitioners' allegations and that thoroughly undercuts their proposals.

The following comparison of the principal allegations raised by Petitioners with the factual record brings this disconnect into sharp focus.

Allegation. Changes are needed to the program access rules because the rules are not working to ensure non-discriminatory access to critical cable programming or to increase MVPD competition.

Facts. The Commission has repeatedly found that the program access rules are working to ensure that competing MVPDs have access to satellite cable programming services.[2] One need only look at the channel lineups of non-cable MVPDs (samples are attached at Exhibit A) to realize that the vast majority of satellite cable programming services are being carried by non-cable MVPDs. Moreover, the Commission has found that increases in competition to cable operators has occurred largely because of the program access rules.[3]

Allegation. Vertically integrated satellite programmers are engaged in widespread violations of the program access rules.

---

[2] See, e.g., Second Annual Competition Report, 11 F.C.C.R. 2060, at ¶ 160 (1995) ("The Commission's enforcement of the program access provisions appears to be meeting one of the goals of the 1992 Cable Act -- ensuring access by competing MVPDs to satellite cable programming from vertically integrated programming services.").

[3] See, e.g., id. at ¶ 159 ("[W]e continue to believe that the program access rules, as enforced by the Commission, successfully promote competition from existing and potential competitors in the video programming distribution market ...."). See also 142 Cong. Rec. H1145, 1151 (daily ed. Feb. 1, 1996) (statement of rep. Tauzin) ("[S]everal years ago in this House we debated a thing called program access in connection with the cable industry. ... [W]hat it produced for America was competition in the cable industry.").

Facts. In the five years since the program access rules were adopted, only 38 complaints have been initiated at the Commission (an additional six petitions for exclusivity and one waiver request have been filed). Liberty Media attaches as Exhibit B a detailed chart itemizing each of these proceedings. The chart below summarizes the data from Exhibit B.

BREAKDOWN OF PROGRAM ACCESS CASES FILED TO DATE		
TYPE OF CASE	**TOTALS**	
COMPLAINTS		
Settled	18	
Denied	4	
Dismissed	3	
Withdrawn	2	
Granted	3	
Pending	8	
Total Number of Complaints Filed		38
NON-COMPLAINT PROCEEDINGS		
Petitions for Exclusivity	6	
Waiver Request	1	
Total Number of Petitions/Waivers Filed		7
TOTAL NUMBER OF PROGRAM ACCESS CASES FILED TO DATE		45

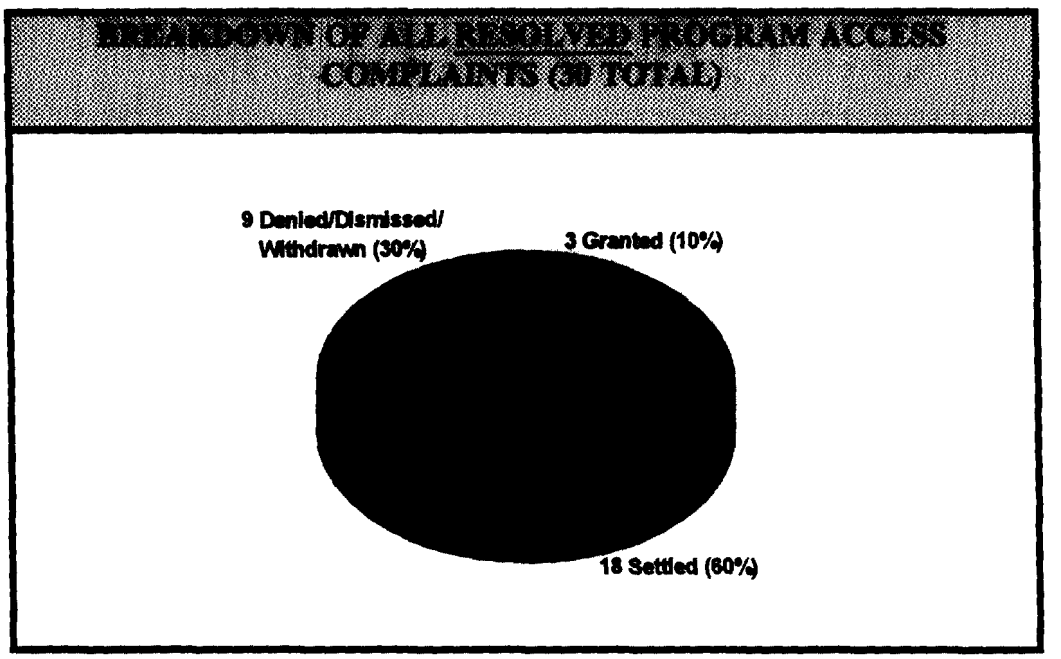
When one considers the many thousands of programming contracts between MVPDs and vertically integrated satellite programmers that are subject to the program access rules, 38 complaints represents a tiny fraction. In fact, if one considers the number of complaints as a percentage of the approximate number of potentially affected programming contracts of the top 50 MSOs, only about 1.1% (or .22% for each year since the rules were adopted) of all such contracts have been the subject of a program access complaint (i.e., 38 complaints ÷ (50 MSOs x 68 national vertically integrated satellite cable programming services)).

Moreover, the facts underlying the 30 complaints that have been resolved to date are equally, if not more, revealing. In 90% of the complaints resolved to date, no program access violation has been found. In only three instances has the Commission found that discrimination has occurred under the rules.

Allegation. The Commission's handling of program access complaints has been inefficient, and this has caused significant harm to non-cable MVPDs. In particular, Ameritech asserts that the Commission has taken an "inordinately lengthy" amount of time (on average, almost 13 months) to process program access complaints. In order to address this problem, time deadlines should be imposed on the Commission, and the pleading cycle should be shortened.

Facts. On average, the Commission has resolved cases involving refusals to sell in 6.5 months, half the time asserted by Ameritech. On average, the Commission has resolved other program access cases in 8.1 months. Thus, the Commission has characterized as "misleading" Ameritech's allegations about the timing of program access complaint resolution. (Notice at ¶ 37)

Moreover, the Commission has been highly successful in encouraging parties to privately resolve program access disputes. As the following chart demonstrates, in 60% of all complaints resolved to date, the parties have decided to settle their differences after a program access complaint has been brought.



Finally, in 24 of the 38 complaints filed to date (63%), the Commission has granted extensions of time in which to file pleadings, indicating that the existing program access pleading cycle is often insufficient to begin with and, therefore, reduction of that cycle is not appropriate. (See Exhibit B).

Allegation. Expanded discovery is essential to ensure the more meaningful and vigorous enforcement of the program access rules.

Facts. In only 2 of the 38 complaints filed to date has the Commission felt the need to allow discovery. Liberty Media is unaware of any instance where the Commission has denied a complainant's reasonable request for discovery.

Allegation. The program access rules are not a sufficient deterrent to anti-competitive behavior by cable operators and programmers without the significant economic disincentive created by a damages remedy.

Facts. The Commission already has available a significant deterrent to anti-competitive behavior in the form of the $7,500 per-day forfeitures authorized by Section 628(e)(2) (the Commission may increase this amount to the statutory limit of $27,000 per violation, per day). The argument for a new damages remedy is particularly unpersuasive given that the Commission has never even sought to use its existing forfeiture power.

Moreover, the facts set forth above show that the rules are already working to stem any anti-competitive behavior and to resolve program access disputes without the need for an extraordinary damages remedy that would simply complicate and prolong the regulatory process.

* * *

The foregoing analysis demonstrates that there is no record, let alone an adequate record, to support adoption of Petitioners' proposals to change the program access rules.[4] Such a conclusion is especially true given that the Commission has previously addressed each of these proposed changes and determined that there is no evidence justifying Commission action.[5] If anything, the

---

[4] Also, as shown below, under the plain meaning of Section 628, the Commission is without legal authority to adopt a damages remedy in program access cases or to extend the program access rules to programming services that have always been distributed via non-satellite means.

[5] See Third Annual Competition Report, 12 F.C.C.R. 4358, at ¶160 (1997) ("parties have not provided sufficient evidence to persuade us that penalties [and damages] are necessary at this time to

(continued ...)

factual record reaffirms that these prior Commission determinations were correct then and continue to be correct today.[6] Accordingly, except for the possible establishment of reasonable deadlines for resolving program access cases,[7] Liberty Media strongly urges the Commission not to adopt the changes to the program access rules proposed by Petitioners and raised in the Notice.

(... continued)

ensure effective enforcement of our program access rules."); Program Access Order, 8 F.C.C.R. 3359, at ¶ 135 (1993) ("Program Access Order") ("Given the nature of the programming distribution marketplace, and the wide range of sales practices, we do not believe that it would be efficient or advisable to mandate uniform discovery processes herein for Section 628 complaints."); id. at n.223 (1993) (rejecting a 20-day period in which to file an answer in the program access context).

[6] In fact, were the Commission to adopt Petitioners' proposals on this record (particularly in light of the Commission's prior determinations), it would be acting contrary to well-established judicial precedent to avoid rule changes unsupported by substantial record evidence. See, e.g., Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Auto Ins. Co., 463 U.S. 29, 43 (1983) (an agency acts arbitrarily and capriciously if it "offer[s] an explanation for its decision that runs counter to the evidence before the agency."); Association of Public-Safety Communications Officials-International, Inc. v. FCC, 76 F.3d 395, 398 (D.C. Cir. 1996) (the FCC must demonstrate "that it has based its decision on a reasoned analysis supported by the evidence before the Commission.").

[7] As discussed in Section V, infra, Liberty Media does not oppose Ameritech's proposal to impose deadlines on the resolution of program access complaints, provided any such deadlines account for the potential complexity of these cases and are presumptive rather than mandatory in nature.

II. LIBERTY MEDIA STRONGLY SUPPORTS THE COMMISSION'S TENTATIVE CONCLUSION NOT TO CHANGE ITS CURRENT DISCOVERY RULES IN PROGRAM ACCESS CASES.

Although advanced as part of a proposal to expedite the complaint process, Ameritech's proposal to import into program access proceedings a right to conduct discovery procedures like those in civil litigation in federal courts would have exactly the opposite effect: Just as it does in civil litigation, full-blown discovery in program access cases would dramatically increase the cost, complexity, and duration of such cases. That would conflict directly with the purposes of Section 628.

Such broadened discovery would present particular difficulties in Commission proceedings, because the Commission staff charged with handling program access complaints does not have the infrastructure or the powers of a court. Effective limits on discovery and effective protections for confidential material would be difficult, if not impossible, for the Commission to enforce. Discovery would become -- as it often does in the courts -- a weapon for tactical advantage rather than a means to facilitate resolution of the issues. For these reasons, Liberty Media strongly opposes any expansion of the current discovery rules.

A. The Commission's Current Rules Provide For Adequate Discovery Where It Is Necessary.

The Commission's current practice is to allow closely limited and supervised discovery in program access complaints upon a

showing of particularized need.[8] The Commission thus has the flexibility to avoid burdensome, intrusive, and time-consuming discovery while still allowing for development of a factual record on the matters actually relevant to the issues in the case. Consistent with this practice, the Commission has permitted discovery in two program access cases.[9] To the best knowledge of Liberty Media, the Commission has allowed discovery in all cases in which a complaining MVPD showed a need for it.

This record reveals no deficiency or unfairness in the current discovery practices and policies, and, thus, no reason for change. Rather, it demonstrates that the current system of "Commission-controlled discovery has worked adequately . . . and will continue to serve the public interest best."[10]

B. Broad Or Routine Discovery Would Be Squarely At Odds With The Purposes Of The Program Access Provisions.

1. Expanded Discovery Would Result In Undue Burdens, Costs, And Delays.

Expansion of discovery would conflict directly with Congress' directive that program access cases be resolved expeditiously.[11] The Commission itself has observed that, "[i]n our experience,

---

[8] See Program Access Order at ¶ 94.

[9] See National Rural Telecommunications Cooperative v. EMI Communications Corp., 10 F.C.C.R. 9785 (1995); Satellite Receivers, et al. v. CNN, CSR Nos. 4685-P, 4686-P, 4684-P, 4706-P (consolidated 1996).

[10] Notice at ¶ 44.

[11] 47 U.S.C. § 548(f)(1).

discovery has been the most contentious and protracted component of the formal complaint process."[12] "Discovery is inherently time-consuming and often fails to yield information that aids in the resolution of a complaint."[13] Moreover, discovery is "susceptible to abuses that often cause undue delays in [the] consideration of the merits of a complainant's claims."[14]

These conclusions are supported by the extraordinary requests for discovery that parties have previously submitted to the Commission in pending program access cases under the current rules. For example, in a recent program access complaint, EchoStar requested "all documents reflecting the terms and conditions governing each Cable Operator's purchase or licensing of any retransmission or distribution rights from Fox, including without limitation all amendments, renewals or extensions." In addition, EchoStar requested access to any other "documents sufficient to disclose fully the terms and conditions governing each Cable Operator's purchase or licensing" of specified program services.[15] In effect, EchoStar sought every contract and every document

---

[12] Amendment of Rules Governing Procedures to Be Followed When Formal Complaints Are Filed Against Common Carriers, Report and Order, CC Docket No. 96-238, FCC 97-396, at ¶ 102 (rel. Nov. 25, 1997) ("Formal Complaint Order").

[13] Id. at ¶ 101.

[14] Id. at ¶ 115.

[15] See EchoStar Communications Corporation v. Fox/Liberty Networks, L.L.C. et al., File No. CSR-5138-P, "EchoStar's First Request For the Production of Documents," filed Dec. 30, 1997.

relating to every relationship between the programmer-defendant and every cable operator.

These requests are typical of the sort of demands that are commonplace under the civil litigation practices that Petitioners propose to import into the program access complaint process. Inevitably, the party that receives such intrusive demands will resist them, thereby leading to a debate among the parties that is likely to require resolution by the Commission. That, of course, leads directly back to the essence of the process that exists under the current rules -- Commission-controlled discovery.[16] Nothing but inefficiency and delay would arise from adding a contentious prelude to the current discovery process.

2. Expanded Discovery Would Compromise The Confidentiality Of The Programmer-MVPD Relationship And Thereby Seriously Impair The Negotiations Process.

The contracts negotiated between programmers and MVPDs contain highly sensitive information regarding the rates and terms of programming agreements. Of critical importance in fashioning such agreements is strict confidentiality regarding the terms and rates discussed. Without protection from disclosure, programmers would be deprived of all flexibility in fashioning deals with different

---

[16] Notice at ¶ 44.

MVPDs. As the Commission has recognized, disclosure of such confidential information could produce serious competitive harm:

> [D]isclosure of [programming] contracts could result in substantial competitive harm. Release of the contracts . . . would provide other carriers with key contractual provisions that they can use in tailoring competitive strategies. Moreover, disclosure could adversely affect the subject carriers' negotiating posture with . . . distributors and might disrupt the carriers' business relationship with . . . distributors currently under contract with the carriers.[17]

Discovery as a matter of right would force programmers to produce contracts and other proprietary, sensitive, and confidential business information to complaining MVPDs upon the mere filing of a program access complaint. Such easy access to a programmer's carriage contracts would encourage MVPDs to file program access complaints in order to gain access to such confidential information and thereby afford them an unjustified competitive advantage in contract negotiations. For these reasons, the Commission has consistently determined that programming contracts should not be routinely available through discovery because "the production of [programming contracts] would unnecessarily risk the disclosure of sensitive business information."[18]

---

[17] National Rural Telephone Cooperative on Request for Inspection of Records, Memorandum Opinion and Order, 5 F.C.C.R. 502, at ¶ 12 (1990). See also OVS Order, 11 F.C.C.R. 18223, at ¶ 132 (1996) ("making carriage contracts public would stifle competition [and] divulge sensitive information.").

[18] See, e.g., Letter from Meredith Jones, Chief, Cable Bureau, to Wesley R. Heppler and Paul Glist, 10 F.C.C.R. 9433 (1995).

Nor can this problem of disclosure be solved through the simple use of protective orders, particularly the type of standardized protective order attached to the Notice. Regardless of how effective the protective order may be, it remains highly likely that the confidential business information would later be used against the submitting party. There is simply no way for the Commission or the programmer to prevent knowledge acquired in a program access case from being used against the programmer in other contexts. Even if sanctions ultimately are imposed on the party for breaching the protective order, that may provide little comfort to the programmer whose proprietary information is divulged. Thus, even the possibility of discovery (and eventual disclosure) would severely restrict Liberty Media's ability to fashion creative and mutually beneficial agreements with different MVPDs. The only way to adequately deal with this confidentiality issue is the method used under the current rules, i.e., where the Commission limits the disclosure of information through a targeted discovery process, and where customized protective orders are created as needed to safeguard any confidential information produced in each case.

Finally, the Commission lacks the practical power and the infrastructure to manage routine discovery of highly confidential and commercially sensitive information in program access complaint cases. Procedures and restrictions that might be adequate where imposed and enforced by a court with full jurisdiction over all affected parties are likely to be inappropriate where an administrative agency with limited powers is called upon to enforce them. Instead, the Commission should continue its current practice

of authorizing limited discovery in those rare instances in which discovery is necessary to the resolution of a program access complaint.

3. The Alternative To Discovery As Of Right Proposed By Ameritech Is Equally Problematic.

As an alternative to discovery as of right, Ameritech proposes, and the Notice seeks comment on, whether discovery requests, and oppositions to such requests, should be incorporated directly into the parties' pleadings.[19]

Like discovery as of right, this proposal turns the workings of the program access rules on their head by, in effect, institutionalizing a discovery process into every program access case. Such a rule change would allow -- even encourage -- every MVPD that files a program access complaint to include a discovery request as part of its complaint. This, of course, would prompt every answer to include oppositions to such discovery requests, as well as the discovery requests of the defendant. The reply round would be similarly exploratory and contentious. Thus, even before the Commission staff sat down to decide how to address the principal substantive issues in the case, it would have to deal with a quagmire of discovery decisions. Moreover, unlike the current rules, such a protracted discovery process would occur even before the Commission determined whether the complainant had established a prima facie case that a program access violation had

---

[19] See Notice at ¶ 42.

occurred. If the Commission later determined that a prima facie case had not been made, all of the discovery that complicated the pleading process would have been entirely wasteful.

Such a scenario is squarely at odds with Congress' and the Commission's principal vision of a streamlined program access process under which issues are resolved in the first instance based on the specific pleadings submitted. Since, as shown above, the current rules provide for adequate discovery where it is necessary (without the attendant complexities, costs, and delays), there is no basis for any changes, and Ameritech's alternative discovery proposal should therefore be rejected, as well.

III. THERE IS NO POLICY OR LEGAL BASIS FOR A DAMAGES REMEDY IN PROGRAM ACCESS CASES, AND SUCH A REMEDY COULD SIGNIFICANTLY UNDERMINE THE GOALS OF PROGRAM ACCESS.

A. Damages Are Wholly Unwarranted Given The Availability Of The Forfeiture Remedy And The Evidence That The Rules Are Already Working To Deter Anticompetitive Behavior And To Effectively Resolve Complaints.

The sole basis for Petitioners' proposal for adoption of a damages remedy is that damages are needed because the program access rules cannot act as an "antidote" for anti-competitive behavior unless there is a significant economic disincentive provided for in the rules.[20]

There are two fundamental problems with this argument. First, it ignores the fact that the Commission already has available to it

---

[20] See, e.g., Ameritech Petition at 9; Notice at ¶ 8.

a significant "antidote" to anti-competitive behavior in the form of the $7,500 per day forfeitures authorized by Section 628(e)(2) and the Commission's forfeiture policy.[21] Moreover, the Commission has discretion to increase the forfeiture penalty to $27,000 per program access violation, per day, if it finds that the facts so warrant.[22] In fact, the Commission's forfeiture power was created for the express purpose of establishing an effective monetary deterrent to violations of the Commission's rules.[23] The argument for a new damages remedy is particularly unpersuasive given that the Commission has never even sought to use its existing forfeiture power.

Neither Ameritech nor any other party has provided any reason why the existing forfeiture remedy is not adequate to deter anti-competitive conduct in the program access context. In fact, Ameritech's petition reads as if Ameritech is unaware that a forfeiture remedy is already available to the Commission in the program access context:

> The Commission should amend its rules to provide economic disincentives, in the form of forfeitures and/or award of damages, for all violations of Section 628.[24]

---

[21] See The Commission's Forfeiture Policy Statement and Amendment of Section 1.80 of the Rules to Incorporate the Forfeiture Guidelines, 8 Comm. Reg. (P&F) 1314 (1997).

[22] Id. at ¶ 27 and Appendix A.

[23] Id. at ¶ 19 (setting the forfeiture amounts so that they will "serve as a deterrent and foster compliance with our rules.").

[24] Ameritech Petition at 21 (emphasis added).

Since forfeitures are already expressly provided for in the Commission's program access rules,[25] and since Ameritech's petition acknowledges that forfeitures are equally capable of deterring anti-competitive behavior, Ameritech's request for a damages remedy should be dismissed.

Second, the facts surrounding the existing program access complaints further demonstrate that no new "antidote" is necessary because the program access rules are already working. As shown above, in the five years since adoption of the rules, only 38 complaints have been filed. In only one case has a programmer been found in violation of the nondiscriminatory pricing restriction, and in only two cases has the Commission found an unreasonable refusal to deal. In addition, 60% of the cases concluded to date have been settled by the parties. Thus, the evidence demonstrates that even without the extraordinary remedy of damages, the threat of the existing sanctions is sufficient to deter violations and to induce private resolution of disputes.

Given this record, it is not surprising that the Commission only recently refused to adopt a damages remedy, stating that there is not

> sufficient evidence to persuade us that [damages] are necessary at this time to ensure enforcement of our program access rules.[26]

---

[25] See 47 C.F.R. § 76.1003(s)(2).

[26] Third Annual Competition Report at ¶ 160.

This reflects the Commission's earlier judgments, as well. For example, in the Reconsideration Order, the Commission determined that it was

> not persuaded by petitioners' arguments that creating [a damages] remedy for violations of the program access rules is necessary at this time. Instead, we believe that the sanctions available to the Commission, pursuant to Title V, together with the program access complaint process, are sufficient to deter entities from violating the program access rules.[27]

No party has offered any new facts or evidence demonstrating that these prior Commission determinations are no longer applicable or that the current rules are not working to deter program access violations or to resolve program access disputes. Indeed, the facts discussed above support precisely the opposite conclusions.

B. A Damages Remedy Could Actually Reduce The Efficiency Of The Program Access Rules.

In addition to being unnecessary, a damages remedy could actually reduce the efficiency of the program access rules in significant ways. Most importantly, a damages remedy would require additional rounds of pleadings and debate to determine whether and to what extent damages should be imposed in a particular case. Such additional proceedings would impose significant delays and costs, contrary to the Commission's overriding concern that the program access rules provide an efficient and timely remedy.

---

[27] Program Access Reconsideration Order, 76 R.R.2d (P&F) 1085, at ¶ 18 (1994).

This is particularly true "[g]iven the nature of the programming distribution marketplace, and the wide range of sales practices,"[28] as well as the "myriad circumstances faced by the Commission in resolving program access complaints."[29] In such a diverse marketplace, the Commission could not reasonably adopt standard damage awards that would apply uniformly in various types of program access cases.[30] Rather, adoption of a damages remedy would necessitate greater Commission involvement in a morass of complex issues regarding the determination of an appropriate price charged by programmers to MVPDs and the appropriate calculation of damages in any given case. Such a regulatory-intensive scenario is squarely at odds with the Commission's principal objective to conserve Commission resources by reducing its level of engagement in the program access resolution process.[31]

C. The Commission Is Not Authorized To Create A Damages Remedy In The Program Access Context.

Not only is adoption of a damages remedy unjustified as a policy matter, Liberty Media believes it is unsustainable as a legal matter. At best, the Commission's authority to impose damages is uncertain.[32] Under such circumstances, it is

---

[28] Program Access Order ¶ 135.

[29] Notice at ¶ 39.

[30] See id. at ¶ 47.

[31] See id. at ¶ 37.

[32] See, e.g., Letter from William Kennard, Chairman, Federal Communications Commission, to Rep. Billy Tauzin, Chairman, House
(continued ...)

particularly inappropriate for the Commission to adopt a damages remedy that is without factual support and that likely will add significant complexity and delay to the resolution of program access complaints.

1. The Commission's Legal Analysis Of Its Authority To Adopt A Damages Remedy Is Unsustainable.

When the Commission reversed its earlier holding that damages were not an available remedy in program access cases under Section 628(e), it based this reversal on the following reasoning:

> [W]e now conclude that Section 628(e) provides the Commission with broad authority to order appropriate remedies. ... [The statute] does expressly empower the Commission to order "appropriate remedies." Because the statute does not limit the Commission's authority to determine what is an appropriate remedy, and damages are clearly a form of remedy, the plain language of this part of Section 628(e) is consistent with a finding that the Commission has authority to afford relief in the form of damages.[33]

Liberty Media respectfully submits that this analysis is inconsistent with the plain meaning of Section 628(e) and applicable precedent regarding the proper construction of statutes.

Most importantly, if the Commission's expansive interpretation of the "appropriate remedies" language were correct, then Congress would not have needed to add subsection (e)(2) to tell the Commission that the remedies provided for in (e)(1) were in

---

(... continued)

Telecommunications Subcommittee, at 17 (Jan. 23, 1998) (seeking congressional "confirmation" that the Commission has the authority to impose damages in program access cases).

[33] Program Access Reconsideration Order at ¶ 17.

addition to other remedies available under the Communications Act, since the "appropriate remedies" language of (e)(1) already would have authorized the Commission to impose such additional remedies. The fact that Congress did add (e)(2) must mean that the Commission's broad interpretation of (e)(1) is incorrect. Stated another way, the only way to give effect to the Commission's reading is to render inoperative or superfluous (e)(2), which the Commission is prohibited from doing.[34] Thus, the Commission's analysis of its damages authority under Section 628(e) must fail.

Rather, the only way to read Section 628(e) so that both subsections (e)(1) and (e)(2) are given full effect is that (e)(1) sets forth a list of specific, prospective remedies that the Commission is authorized to employ in the program access context (i.e., establishing prices, terms, and conditions of the sale of programming to the aggrieved MVPD), and (e)(2) supplements this list of specific remedies with forfeitures and other remedies available under the Communications Act.

Since damages are neither mentioned in (e)(1) nor "available" as an additional remedy under (e)(2),[35] the plain language of these two provisions, when properly read together, indicates that the

---

[34] See Reiter v. Sonotone Corp., 442 U.S. 330, 339 (1979) ("In construing a statute we are obliged to give effect, if possible, to every word Congress used.").

[35] While Title II contains an express damages remedy, this remedy is applicable only to "common carriers subject to this Act," 47 U.S.C. §§ 206-209, and thus is not "available" in the case of non-common carrier MVPD/programmer defendants in program access cases.

Commission is not authorized to employ a damages remedy in program access cases.

This analysis is confirmed by the "if necessary" and "including" qualifiers in Section (e)(1). Because the "if necessary" qualifier modifies the phrase "the power to," it indicates that the Commission has the power to order a remedy under subsection (e)(1) only if such remedy is "necessary."[36] But a damages remedy is not "necessary" in the program access context because, as discussed in the previous section:

(1) to date, the Commission has not even needed to use its existing forfeiture power in any program access case, so it is hard to understand how damages, a remedy that is not even mentioned in the Act, could somehow be "necessary;" and

(2) an insignificant number of program access complaints have been filed (38), and nearly half of such cases (18) have been settled by the parties. This indicates that the current rules are working without the "need" for an extraordinary new damages remedy.

Since there is no established need for damages as a new remedy, the "if necessary" qualifier of (e)(1) provides that the Commission lacks the requisite power to order such a remedy.

Similarly, the "including" qualifier in (e)(1) reinforces that (e)(1) is limited to specific, prospective remedies. Under the ejusdem generis canon of statutory construction, a general term is limited by the specific terms which follow it, so that the general

---

[36] See 47 U.S.C. § 548(e)(1) ("[T]he Commission shall have the power to order appropriate remedies, including, if necessary, the power to establish prices, terms, and conditions ....") (emphasis added).

term embraces "only objects similar in nature" to the specific enumerations.[37] Courts have applied this canon where a statute defines a term, then states that the term "shall include" certain specific items.[38] By specifying that the general term "appropriate remedies" includes the power to establish prices, terms, and conditions, Congress further indicated that the class of remedies available under Section 628(e)(1) was limited to prospective, injunctive relief. Congress thus precluded the imposition of a backward-looking, punitive-type remedy, such as damages.

Finally, the fact that Congress specifically prescribed a damages remedy in the common carrier context[39] demonstrates that Congress knows how to authorize a damages remedy for communications entities where it wants to do so. Congress' omission of a specific reference to damages in section 628(e) when such a specific reference was used in a similar provision of the Communications Act further indicates that Congress intended to prohibit the Commission from adopting a damages remedy in the program access context.[40]

---

[37] See 2A Sutherland Stat. Const. § 47.17 (5th ed.).

[38] See, e.g., Trinity Services, Inc. v. Marshall, 593 F.2d 1250, 1253 (D.C. Cir. 1978) (emphasis added).

[39] See 47 U.S.C. § 209.

[40] See Russello v. United States, 464 U.S. 16, 23 (1983) ("where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposefully in the disparate inclusion or exclusion.") (quoting United States v. Wong Kim Bo, 472 F.2d 720, 722 (5th Cir. 1972)).